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No. 92-681

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In the Supreme Court of the United States

OCTOBER TERM, 1992

EDWARD G. NOVOTNY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether Art. III, § 2, Cl. 3 of the Constitution or the Jury Trial Clause of the Sixth Amendment requires a trial by jury for the offense of removing timber from a national forest without authorization, where the maximum authorized penalty is six months' imprisonment and a $5,000 fine.

2. Whether the district court had jurisdiction to try petitioner.

3. Whether the district court improperly allowed the government to exceed its statutory authority in prosecuting petitioner.

4. Whether the district court imposed an excessive sentence upon petitioner in violation of the Eighth Amendment.

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals, Pet. App. 1-22, is not published, but the judgment is noted at 968 F.2d 22 (Table).

JURISDICTION

The judgment of the court of appeals was entered on June 5, 1992. A petition for rehearing was denied on July 1, 1992. Pet. App. 23. The petition for a writ of certiorari was filed on October 5, 1992, and accordingly is out of time under the Rules of this Court. Sup. Ct. R. 13.1 and 13.4. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the District of Colorado, petitioner, who represented himself, was convicted on one count of removing timber from the San Juan National Forest without authorization, in violation of 36 C.F.R. 261.6(h).[1] He was sentenced to a term of three months' imprisonment and was ordered to pay a fine of $2,500. The court of appeals affirmed.

1. On October 18, 1990, petitioner was hauling a trailer load of aspen logs in the San Juan National Forest when he was stopped at the Forest Service boundary by Colorado State Patrol Trooper Steven Nowlin. Trooper Nowlin asked petitioner where he had cut the wood, and petitioner identified an area located within the forest. Trooper Nowlin then asked petitioner if he had a permit authorizing him to remove the wood from the forest. Petitioner admitted that he did not have a permit but claimed that he did not need one because the forest belonged to the citizens and he had their permission to cut wood. Trooper Nowlin explained that a permit was necessary and that he would have to report petitioner's unauthorized removal of the wood to the Forest Service. Petitioner then went on his way. Pet. App. 2-3, 16; Gov't C.A. Br. 1-2.

About two weeks later, Trooper Nowlin accompanied Tracey Morse, a law enforcement officer for the Forest Service, to petitioner's residence. Officer Morse explained to petitioner that anyone desiring to remove wood from the forest needed a permit. Petitioner again

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[1] 36 C.F.R. 261.6(h) prohibits the "[r]emov[al] [of] any timber, tree or other forest product, except as authorized by a special-use authorization, timber sale contract, or Federal law or regulation."

admitted that he had no permit, and he claimed that Forest Service regulations did not apply to him because he was a United States citizen and everything on public land was free for citizens. Officer Morse then served petitioner with a violation notice for removing the logs from the forest without a permit. Pet. App. 3, 16; Gov't C.A. Br. 2-3, 9.

2. Following a bench trial that resulted in petitioner's conviction, the court of appeals affirmed in an unpublished judgment order. Pet. App. 1-22. The court rejected petitioner's claim—purportedly founded upon his status as a "free citizen," *id.* at 3—that the district court lacked personal and subject matter jurisdiction to try him. The court of appeals held that the district court had subject matter jurisdiction under 16 U.S.C. 551 (authorizing the Secretary of Agriculture to make rules and regulations for the protection of national forests, and subjecting violators of such rules and regulations to criminal sanctions) and 18 U.S.C. 3231 (conferring on federal district courts original jurisdiction over all offenses against the laws of the United States). Pet. App. 5-6. Noting that the basis for petitioner's claim that the district court lacked personal jurisdiction over him was "not clear," the court characterized that claim as "frivolous," given that petitioner offered "no support" for it, was charged by information with violating a federal law, and appeared before the district court in connection with that charge. *Id.* at 6-7.

Next, the court rejected petitioner's claim that he was not required to abide by 36 C.F.R. 261.6(h) because, in his view, it was not a law and his conduct did not affect commerce or involve a contract or an injured party. The court observed that 16 U.S.C. 551 required petitioner to

abide by the regulation, Pet. App. 9-10, and that conduct need not affect commerce or involve a contract or an injured party in order for it to fall within the ambit of the regulation, *id.* at 10-11.

The court also rejected petitioner's claim that he was denied his Sixth Amendment right to a jury trial. Reviewing that claim *de novo*, the court held that petitioner was not entitled to a jury trial in this case for several reasons. First, 16 U.S.C. 551 sets six months as the maximum prison term for a violation of 36 C.F.R. 261.6(h). Second, petitioner "did not show that any additional penalties he faced were so serious a jury trial was required even though he faced limited jail time." Third, "there was no evidence in the record suggesting the government was 'corrupt or overzealous' in charging" petitioner. Fourth, "there was no indication that the judge was compliant, biased, or eccentric." Pet. App. 12-13 (internal quotation marks omitted).

Finally, the court rejected petitioner's claims that his three-month prison term was excessive and his fine unauthorized. The court explained that both the prison term and the fine were within statutory limits: The prison term did not exceed the six-month maximum prison term prescribed by 16 U.S.C. 551, and although 16 U.S.C. 551 set a maximum fine of $500, 18 U.S.C. 3571(b)(6) raised that maximum to $5,000. Pet. App. 19-20.[2]

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[2] Petitioner raised a host of other claims, all of which the court of appeals rejected either on the merits or—where they were stated in "conclusory" fashion and not "developed adequately by factual allegation or legal argument," Pet. App. 20-21—without discussion. *Id.* at 7-9, 11-12, 13-19, 20-21. Petitioner does not raise any of those claims in this Court.

ARGUMENT

Petitioner renews his claims that the district court lacked jurisdiction to try him for a violation of 36 C.F.R. 261.6(h), that if it had jurisdiction it should have given him a jury trial, and that his sentence was excessive. Pet. 13-30. Only petitioner's jury trial claim, Pet. 25-26, merits the attention of this Court.

1. The court of appeals correctly ruled, Pet. App. 12-13, that petitioner was not entitled to a jury trial since the maximum prison term for a violation of 36 C.F.R. 261.6(h), a Class B misdemeanor, is six months. See 16 U.S.C. 551; 18 U.S.C. 3559(a)(7), 3581(b)(7). In *Blanton* v. *City of North Las Vegas*, 489 U.S. 538, 543 (1989), this Court held that an offense carrying a maximum prison term of six months or less is presumed to be a petty offense—*i.e.*, one for which the Sixth Amendment does not require a jury trial—and that a defendant can overcome the presumption "only if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one."

As the court of appeals explained, petitioner "did not show that any additional penalties he faced were so serious a jury trial was required even though he faced limited jail time." Pet. App. 13. Although, in addition to six months' imprisonment, petitioner was subject to a maximum fine of $5,000, see 18 U.S.C. 3571(b)(6), that penalty was not so onerous as to elevate 36 C.F.R. 261.6(h) to a "serious" offense requiring a jury trial. Incarceration and fines are "intrinsically different," as the Court explained in *Blanton*, and a fine "cannot approximate in severity the loss of liberty that a prison term entails." 489 U.S. at 542 (quoting *Muniz* v. *Hoffman*, 422 U.S. 454,

477 (1975)). Indeed, *Blanton* strongly suggested that the $5,000 fine authorized by Congress for petty offenses would not render an offense "serious" for jury trial purposes. 489 U.S. at 544-545; see 18 U.S.C. 19 (defining a "petty offense" in the case of an individual defendant as one for which the maximum fine is no greater than $5,000 (the amount set for petty offenses in 18 U.S.C. 3571(b)(6) (Class B and C misdemeanors) and 3571(b)(7) (infractions)); 18 U.S.C. 1 (Supp. IV 1986) (same), cited at *Blanton*, 489 U.S. at 544-545.

Although we believe that the judgment below was correct, the Tenth Circuit's decision in this case conflicts with the Ninth Circuit's decision in *United States* v. *Nachtigal*, 953 F.2d 1389 (1992) (Table), petition for cert. pending, No. 92-609. We have filed a petition for a writ of certiorari seeking review of the Ninth Circuit's judgment in *United States* v. *Nachtigal*. Our petition raises the question whether a jury trial is constitutionally required for the offense of driving under the influence of alcohol, where the maximum authorized penalty is six months' imprisonment and a $5,000 fine. Because the Court's disposition of our certiorari petition in *Nachtigal* may affect the proper disposition of this case, the Court may wish to hold this petition pending its disposition of our petition in *Nachtigal*.

2. The court of appeals correctly rejected petitioner's claim that the district court lacked jurisdiction to try him. Pet. App. 5-7. The judicial power extends to all cases arising under the Constitution and laws of the United States. U.S. Const. Art. III, § 2, Cl. 1. The district courts "have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States." 18 U.S.C. 3231. As the court of appeals observed, in 16 U.S.C. 551, a federal statute,

Congress authorized the Secretary of Agriculture to promulgate rules and regulations for the protection of national forests. Pet. App. 5. Pursuant to that authority, the Secretary promulgated 36 C.F.R. 261.6(h), a federal regulation.

The information in this case charged petitioner with the unauthorized removal of timber from the San Juan National Forest on October 18, 1990, "all in violation of 16 U.S.C. Section 551 authorizing 36 CFR Section 261.6(h)." A federal law enforcement officer served petitioner with a notice of violation, and petitioner appeared in district court in connection with that notice. As a general rule, the presence of the defendant before the court gives the court personal jurisdiction over him. See *United States* v. *Crews*, 445 U.S. 463, 474 (1980); *Frisbie* v. *Collins*, 342 U.S. 519, 522 (1952); *Ker* v. *Illinois*, 119 U.S. 436, 444 (1886). Accordingly, the district court had both personal and subject matter jurisdiction to try petitioner.

3. Petitioner frames his third question presented as follows: "Did the inferior Tribunal error [*sic*] by allowing the Executive Branch to exceed their authority and limitations granted by Acts of Congress." This question is too vague to be capable of meaningful response. Accordingly, under this Court's Rule 14.5, the question should be denied review because of petitioner's failure to present clearly "whatever is essential to a ready and adequate understanding of the points requiring consideration."

To the extent that the question can be narrowed at all, it appears to pertain to the following portion of the body of the petition, Pet. 16:

> Government agencies are not allowed to exceed the authority granted to them by Congress. The commissioner stated that the Petitioner "stole something from the national forest". But * * * the National Forest[] is public forest, and * * * Petitioner is one of The People[] that the public forest belongs to.
>
> The Petitioner * * * cannot steal what is his, nor steal something from the forest service which it does not own.

That analysis is frivolous and does not merit the attention of this Court.

4. The court of appeals correctly rejected petitioner's contention that his sentence was excessive. Pet. App. 19-20. As the court explained, both the three-month term of imprisonment and the $2,500 fine imposed on petitioner were within statutory limits. *Ibid.* Appellate courts generally do not disturb sentences imposed for non-capital felony offenses—let alone sentences imposed for misdemeanors, such as 36 C.F.R. 261.6(h)—that fall within statutorily prescribed limits, absent an abuse of discretion by the sentencing court. See *Harmelin* v. *Michigan*, 111 S. Ct. 2680, 2703 (1991) (plurality opinion); *Hutto* v. *Davis*, 454 U.S. 370, 373-374 (1982). Petitioner points to nothing in the record that remotely suggests that such an abuse occurred here. Accordingly, petitioner's claim warrants no further review.

CONCLUSION

With respect to the first question presented, the petition for a writ of certiorari should be held pending the disposition of the petition filed in *United States* v. *Nachtigal*, No. 92-609, and then disposed of as appropriate in light of that disposition. In all other respects, the petition should be denied.

Respectfully submitted.

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